

NOTE: The following is a draft response to a request for an advisory opinion prepared for consideration by the Citizen's Ethics Advisory Board. It does not necessarily constitute the views of the Board.

TO: Board Members

FROM: Brian J. O'Dowd, Assistant General Counsel

RE: Interpretation of General Statutes §§ 1-82a (b) and 1-93a (b)

DATE: August 15, 2007

INTRODUCTION

The Citizen's Ethics Advisory Board (Board) issues this advisory opinion at the request of an assistant general counsel with the Office of State Ethics who was recently asked the following question: What information, if any, may a complainant disclose to a third party following the filing of a formal complaint with the Office of State Ethics alleging a violation of the Codes of Ethics, chapter 10, parts 1 and 2, of the General Statutes (Codes of Ethics)?

RELEVANT FACTS

The following facts are relevant to this opinion. A formal complaint under the Codes of Ethics arises in one of two ways: either the ethics enforcement officer issues a complaint after undertaking a confidential¹ evaluation of a possible violation of the Codes of Ethics, or a person files a complaint with the Office of State Ethics on a Board-approved form alleging that a person has violated the Codes of Ethics. General Statutes §§ 1-82 (a) (1) and 1-93 (a) (1). In the latter case, the ethics enforcement officer is statutorily required to investigate such allegations. General Statutes §§ 1-82 (a) (1) and 1-93 (a) (1). Any such investigation

shall be confidential except upon the request of the respondent. If the investigation is confidential, the allegations in the complaint and any information supplied to or received from the Office of State Ethics shall not be disclosed during the investigation to any third party by a complainant

General Statutes §§ 1-82a (b) and 1-93a (b).

¹An evaluation of a possible violation of the Codes of Ethics is confidential "except upon the request of the subject of the evaluation. If the evaluation is confidential, any information supplied to or received from the Office of State Ethics shall not be disclosed to any third party by a subject of the evaluation, a person contacted for the purpose of obtaining information or by" a member of the Office of State Ethics. General Statutes §§ 1-82a (a) and 1-93a (a).

If a complainant discloses such information to any third party, the complainant may be subject to an Office of State Ethics enforcement action, including, but not limited to, a civil penalty not to exceed \$10,000 for each violation. See General Statutes §§ 1-88 and 1-99.

QUESTION

The Board has been asked the following question: What information, if any, may a complainant disclose to a third party following the filing of a formal complaint with the Office of State Ethics alleging a violation of the Codes of Ethics?

ANALYSIS

To answer that question, we turn to the pertinent language in §§ 1-82a (b) and 1-93a (b):

If the investigation is confidential, *the allegations in the complaint and any information supplied to or received from the Office of State Ethics* shall not be disclosed during the investigation to any third party by a complainant

(Emphasis added.) A literal reading of that language appears to prohibit a complainant from disclosing, for example, the fact that a complaint was filed, any information gleaned from interacting with the Office of State Ethics, and even the facts that form the basis of the complaint. Such a reading, however, would, according to federal courts that have analyzed the confidentiality of state investigations, violate the first amendment to the United States constitution. See, e.g., *Kamasinski v. Judicial Review Council*, 44 F.3d 106 (2nd Cir. 1994).

To illustrate the constitutional dilemma posed by the language in §§ 1-82a (b) and 1-93a (b), we turn to the Second Circuit Court of Appeals decision in *Kamasinski v. Judicial Review Council*, supra, 44 F.3d 106. In that case, the court addressed the constitutionality of a provision mandating confidentiality (unless and until a finding of probable cause was made) with respect to proceedings before Connecticut's Judicial Review Council (JRC),² the entity responsible for investigating complaints lodged against state judges. *Id.*, 108. The court noted that the restrictions in question were content based and thus applied the strict scrutiny standard, which requires that the

²The provision in question read as follows: "Any investigation to determine whether or not there is probable cause that [misconduct] has occurred shall be confidential and any individual called by the council for the purpose of providing information shall not disclose his knowledge of such investigation to a third party prior to the decision of the council on whether probable cause exists, unless the respondent requests that such investigation and disclosure be open, provided information known or obtained independently of any such investigation shall not be confidential" *Kamasinski v. Judicial Review Council*, supra, 44 F.3d 109.

restrictions serve a compelling government interest and be narrowly tailored to achieve that interest. *Id.*, 109.

After listing numerous state interests served by confidentiality in the early stages of the investigation, the court concluded that the restrictions did indeed serve a compelling state interest: “The state’s interest in the quality of its judiciary, we conclude, is an interest of the highest order.” *Id.*, 110.

It then turned its attention to whether the restrictions were narrowly tailored to serve that interest, explaining that federal courts analyzing the confidentiality of state investigations have indicated that disclosures made by participants in such investigations fall into three categories: (1) “the substance of an individual’s complaint or testimony, i.e., an individual’s own observations and speculations regarding judicial misconduct”; (2) “the complainant’s disclosure of the *fact* that a complaint was filed, or the witness’s disclosure of the *fact* that testimony was given”; and (3) “information that an individual learns by interacting with the JRC, such as information gained by hearing . . . comments made by members of the JRC.” (Emphasis in original.) *Id.*

The court concluded that, under the first amendment, the state may prohibit an individual from disclosing information falling within the latter two categories, namely, the fact of filing a complaint or the fact that testimony was given, and information gained through interacting with the JRC. *Id.*, 111. With respect to information falling within the first category, however, the court concluded otherwise:

Whether the state may prohibit the disclosure of the substance of an individual’s complaint or testimony merits little discussion. Penalizing an individual for publicly disclosing complaints about the conduct of a governmental official strikes at the heart of the First Amendment . . . and we agree with the district court that such a prohibition would be unconstitutional.

(Citation Omitted.) *Id.*, 110; see also *Baugh v. Judicial Inquiry and Review Commission*, 907 F.2d 440, 443 (4th Cir. 1990) (“[i]t is clear that Virginia could not, consistent with the first amendment, punish a person for publicly criticizing a judge”); *First Amendment Coalition v. Judicial Inquiry and Review Board*, 784 F.2d 467, 479 (3d Cir. 1986) (“to the extent the Board’s regulation . . . prevent[s] witnesses from disclosing their own testimony, those directives run afoul of the First Amendment”); *Kamasinski v. Judicial Review Council*, 797 F. Supp. 1083, 1094 (D. Conn. 1992) (“The state’s interest in keeping confidential the *contents* or *substance* of an individual’s own complaint . . . is not adequate to resist First Amendment challenge. This information is not the creation of the JRC’s investigation, but pre-exists it.” [Emphasis in original.]).

We therefore know the following: first, that it would violate the first amendment to prohibit a complainant from disclosing the contents or substance of a complaint, and second, as noted above, that a literal reading of the provisions at issue appears to do just that. Although we “will not ordinarily construe a statute whose meaning is plain and

unambiguous . . . [t]his rule of statutory construction does not apply . . . if . . . a literal reading places a statute in constitutional jeopardy.” (Citations omitted.) *Moscone v. Manson*, 185 Conn. 124, 128, 440 A.2d 848 (1981). “We are bound to assume that the legislature intended, in enacting a particular law, to achieve its purpose in a manner which is both effective and constitutional.” (Internal quotation marks omitted.) *French v. Amalgamated Local Union* 376, 203 Conn. 624, 637, 526 A.2d 861 (1987). Thus, “[i]f literal construction of a statute raises serious constitutional questions, we are obligated to search for a construction that will accomplish the legislature’s purpose without risking the statute’s invalidity.” *Sassone v. Lepore*, 226 Conn. 773, 785, 629 A.2d 357 (1993).

In so doing, we embrace a subtle distinction recognized by Justice Scalia in United States Supreme Court decision in *Butterworth v. Smith*, 494 U.S. 624, 108 L. Ed. 2d 572, 110 S. Ct. 1376 (1990). There, the court held that a Florida statute violated the first amendment by prohibiting a grand jury witness from ever disclosing testimony he gave before the grand jury. *Id.*, 626. In his concurring opinion, Justice Scalia interpreted the majority’s holding to be limited to a witness’s first amendment “right to make a truthful statement of information he acquired on his own.” *Id.*, 636 (Scalia, J., concurring). Left unresolved, he believed, was “[q]uite a different question,” specifically, whether the state could prohibit a grand jury witness from disclosing “not what he knew [i.e., truthful information he acquired on his own], but what it was he told the grand jury he knew.” *Id.*

We make a similar distinction in construing the relevant language in §§ 1-82a (b) and 1-93a (b). That is, we construe the language in those provisions *not* as prohibiting a complainant from disclosing the facts that form the basis of a complaint (i.e., what the complainant knew). Rather, we construe it as prohibiting a complainant from disclosing that those facts were somehow conveyed to the Office of State Ethics (i.e., what it was the complainant told the Office of State Ethics he or she knew). Thus, a complainant may state to a third party: “Public official X used his office for personal financial gain.” But the complainant may not state to a third party: “I informed the Office of State Ethics that public official X used his office for personal financial gain.”

This construction, we believe, not only avoids constitutional difficulties; it also accomplishes what we assume to be a major legislative purpose underlying the provisions: to prevent a complainant from enhancing the credibility of his or her allegations by invoking the name of the Office of State Ethics. See *Providence Journal Co. v. Newton*, 723 F. Supp. 846, 856 (D.R.I. 1989).

CONCLUSION

Based on the foregoing, it is the opinion of the Citizen’s Ethics Advisory Board that §§ 1-82a (b) and 1-93a (b) do not prohibit a complainant from disclosing the facts that form the basis of a complaint (i.e., the facts that a complainant acquires on his or her own). Those provisions do, however, prohibit a complainant from disclosing (1) the existence of a formally-filed complaint, (2) any information acquired through interacting with the Office of State Ethics, and (3) the fact that specific information was conveyed to

the Office of State Ethics. If a complainant discloses such information to any third party, he or she may be subject to an Office of State Ethics enforcement action, including, but not limited to, a civil penalty not to exceed \$10,000 for each violation. Any such disclosure, however, would have no impact on the legal status of his or her underlying complaint.

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